



May 2, 2002

Mr. Michael D. Chisum
General Counsel
Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, Texas 78711

OR2002-2300

Dear Mr. Chisum:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161440.

The Texas Department of Licensing and Regulation (the "department") received four requests for the application of a specific individual for a Texas boxing license. You have submitted seven documents for our review which you claim are excepted from disclosure under section 552.101 of the Government Code in conjunction with various state statutes. We presume that to the extent the application package contains additional information, that information has been released to the requestors. See Gov't Code §§ 552.301, 302 (providing, among other things, that if governmental body does not submit to attorney general copy or representative sample of requested information, that information is presumed public). We also note that one of the requestors seeks copies of e-mails and letters regarding the application in question. You assert that information responsive to this request is excepted from disclosure under sections 552.102 and 552.107. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that another statute makes confidential. Section 56.001 of the Occupations Code, as enacted by the Seventy-seventh Legislature, provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing

agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 56.001.¹ You indicate, and the documents reflect, that the department obtained the submitted social security number in connection with the issuance of a license. Accordingly, we find that the social security number is confidential under section 56.001 of the Occupations Code and thus must be withheld from disclosure under section 552.101 of the Government Code.

You also claim that most of the submitted documents are confidential under the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). We agree that most of the records you have marked are confidential medical records. The department may only release these records in accordance with the MPA. *See* Occ. Code §§ 159.002(c), 159.004, 159.005; *see also* Open Records Decision No. 598 (1991) (in governing access to specific subset of information, Medical Practice Act governs over more general provisions of the Public Information Act).

You also contend that one of the submitted documents must be withheld under section 81.103 of the Health and Safety Code which makes certain test result information confidential. Section 81.103(a) provides:

¹The language of section 56.001 of the Occupations Code corresponds in substance to the language of the former note to section 51.251 of the Occupations Code. House Bill No. 2812, which enacted section 56.001, also repealed the note to section 51.251. *See* Act of May 22, 2001, 77th Leg., R.S., § 14.001(b), 2001 Tex. Sess. Law Serv. 3970, 4098 (Vernon's) (repealing section 1, chapter 314, Acts of the 76th Legislature, Regular Session, 1999).

A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section.

“Test results” are defined as:

any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody.

Health & Safety Code § 81.101(5). We agree that this document contains confidential test results that must be withheld under section 552.101 in conjunction with section 81.103(a).

You also contend that some of the submitted information is excepted from disclosure under section 559.003 of the Government Code. Section 559.003 provides that a biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552. A “biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry. Gov’t Code § 559.001(1). Specifically, you assert that the applicant’s photograph is an example of face geometry. We disagree. Facial geometry or as it is more properly known, facial scan technology, is based on the distinctive features of the face: the position of the eyes, nose, mouth, the location of the cheekbones, chin, eyebrows, and the relation of these key features to each other. *Biometric Market Report 2000-2005*, International Biometric Group. The legislative history of House Bill 678 also reflects that face geometry is more than just the photograph of an individual; it is the unique contours of the face. *See generally* Hearing on H.B. 678 before the House Committee on Business & Industry, 77th Leg., R.S. (February 13, 2001) (remarks of bill sponsor, Representative Brian McCall, and testifying expert). Based on the foregoing, we find that the applicant’s photograph is not a biometric identifier for the purposes of section 559.003. Consequently, the department may not withhold the applicant’s photograph from disclosure.

Next you assert that some of the submitted e-mails may be withheld from disclosure under section 552.107(1). Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. *Id.* at 5. When communications from attorney to client do not reveal the client’s communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney’s legal opinion or advice. *Id.* at 3. You state that these documents represent communications between department staff and legal counsel. After careful review, we agree that these documents

contain client confidences or an attorney's advice and opinion. The department may, therefore, withhold these documents from public disclosure pursuant to section 552.107(1).

Finally, you argue that the remaining documents are excepted from disclosure under section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Public Information Act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Id.* Therefore, information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The information you seek to withhold under section 552.102 relates solely to the work behavior and job performance of a department employee, and as such cannot be deemed outside the realm of public interest. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, based on our review of the information, we conclude that the remaining documents are not protected from disclosure under section 552.102.

Nevertheless, one of these documents contains e-mail addresses that may be protected from disclosure under section 552.137 of the Government Code. Section 552.137 requires the department to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. Consequently, we conclude that, unless the individuals have consented, the department must withhold the marked e-mail addresses from disclosure.

In summary, you may only release the marked medical records in accordance with the MPA. You must withhold the social security number and the confidential test results under section 552.101. You may withhold the marked documents under section 552.107. Unless the individuals have affirmatively consented to release, the department must withhold the

marked e-mail addresses under section 552.137. You must release the remaining information to the requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

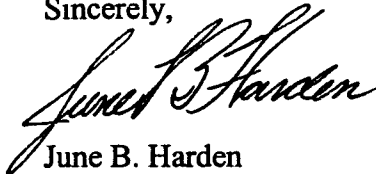
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 161440

Enc. Submitted documents

c: Mr. John H. Hannah, III
4614 Arapahoe Trail
Austin, Texas 78745
(w/o enclosures)

Mr. Mike Leggett
Austin American-Statesman
P.O. Box 670
Austin, Texas 78767
(w/o enclosures)

Mr. Jim Vertuno
Associated Press
1005 Congress Avenue, Suite 995
Austin, Texas 78701
(w/o enclosures)

Mr. Jeff Napshin
Fox 7, KTBC Austin
119 East 10th
Austin, Texas 78701
(w/o enclosures)